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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
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8 KEVIN BRANCA, an individual, on behalf
9 of himself and all others similarly
situated,

CASE NO. 12cv01686-LAB (WMC)
ORDER ON MOTION TO STAY

10 Plaintiff,

11 vs.

12 IOVATE HEALTH SCIENCES USA,
INC., et al.,

13 Defendants.

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15 This case is a consumer protection class action against the manufacturer of the
16 dietary supplement Hydroxycut, which is supposed to help with weight loss. The basic claim
17 is that it doesn't work. The case was filed on July 6, 2012, and on September 12 Iovate filed
18 two motions to dismiss that are now under submission. On January 22, 2013, with the
19 motions still under submission, Iovate filed a motion to stay the case pending the approval
20 of a settlement in a substantively identical class action in Santa Barbara Superior Court.

21 *That case, Garcia v. Iovate Health Sciences U.S.A.*, was filed just two weeks after this one,
22 on July 20, 2012. The spirit of the motion to stay is that proceeding with this case would be
23 a waste of the Court's resources and potentially result in duplicative litigation. The Court
24 agrees, more or less, and the motion to stay is **GRANTED**.

25 Why *not* stay this case, if one that's virtually identical to it, and would resolve all of the
26 claims, has reached a preliminary settlement that is now awaiting court approval? The real
27 reason, according to Branca, is that the *Garcia* settlement is collusive, or at least looks really
28 bad. Here is Branca's explanation.

1 First, Iovate's counsel, Newport Trial Group, is friendly with Garcia's counsel, Kirtland
 2 & Packard. Indeed, Newport Trial Group both prosecutes and defends class actions, and
 3 with Kirtland & Packard it has jointly represented plaintiffs in class actions in the past. Not
 4 only that, but, it is alleged, Newport Trial Group has a grudge against Branca's counsel, The
 5 Weston Firm and Ronald Marron, over a recent class action in this district that it
 6 "unsuccessfully battled" them for control of—and the settlement of which it has objected to
 7 and appealed. (Doc. No. 30 at 3.) See *Gallucci v. Boiron, Inc.*, Case No. 11-CV-2039, Doc.
 8 Nos. 38, 72, 96, 129.

9 Second, Newport Trial Group never notified this Court of *Garcia*, in violation of Local
 10 Civil Rule 40.1(f). It also failed to notify the Santa Barbara Superior Court of this case.
 11 Indeed, in granting Branca's motion to intervene in *Garcia*, the judge presiding over the case,
 12 Judge de Bellefeuille, found that "Garcia and Iovate were not forthcoming regarding the
 13 existence of two pending purported class actions setting forth identical causes of action."
 14 (Doc. No. 30-1, Ex. 1 at 5.)

15 Third, the timing of the *Garcia* settlement vis-a-vis the filing of this case and that one
 16 is suspicious. For one, Newport Trial Group was reaching out to Branca's counsel to
 17 schedule a mediation before Iovate was even served with Garcia's complaint. Also, while
 18 Iovate answered Garcia's complaint on the day it was served, it filed two motions to dismiss
 19 Branca's complaint, one for lack of personal jurisdiction over Defendant Kerr Investment
 20 Corp. and another for failure to state a single claim under Fed. R. Civ. P. 12(b)(6). (Doc.
 21 Nos. 3, 4, 10, 13.)¹

22 The Court has read the parties' briefs and given considerable thought to them. Here's
 23 the basic problem: No matter how hard Iovate tries to argue that a stay is warranted under
 24 *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), and no matter how hard Branca
 25 tries to argue back that a stay isn't warranted under *Colorado River Conservation Dist. v.*

26
 27 ¹ Branca also accuses Iovate of setting the hearing on this motion to stay ten weeks
 28 after it was filed on January 22 because it filed the preliminary approval motion in *Garcia* on
 that same day and wanted to buy some time. (Doc. No. 30 at 19.) Actually, the Court gave
 out the April 2 hearing date for this motion to stay. It was the earliest available date on the
 Court's busy calendar.

1 *United States*, 424 U.S. 800 (1976), the real fight here is for control of a class action
2 between two warring plaintiffs' firms. That fight, moreover, is inseparable from the ostensibly
3 disinterested legal arguments they make for the Court staying or not staying this case.

4 Branca has successfully intervened in *Garcia* to challenge the proposed settlement,
5 and to stay the case in light of this one. In fact, Judge de Bellefeuille has taken the
6 preliminary approval hearing off calendar in order to hear Branca's motion to stay on April
7 4. The Court's view is that if there's something procedurally or substantively unsavory about
8 the *Garcia* settlement, even though it appears to be the result of vigorous bargaining before
9 an experienced mediator, Judge de Bellefeuille should be the judge to say so. *Garcia* is her
10 case. But until Judge de Bellefeuille makes that call, and meaningfully stalls the progress
11 of the *Garcia* settlement, the Court is inclined to exercise its discretionary power under
12 *Landis* to stay this case in the interest of judicial economy. See *Lockyer v. Mirant Corp.*, 398
13 F.3d 1098, 1109 (9th Cir. 2005); *Chartener v. Provident Mut. Life Ins. Co.*, 2003 WL
14 22518526 at *4 (E.D. Pa. Oct. 22, 2003) (granting a six-month stay to abide the approval of
15 a state court settlement).

16 Iovate's motion to stay is **GRANTED** for a period of ninety days. By no later than July
17 1, 2013, the parties must jointly file a status report that informs the Court of the outcome of
18 the proposed settlement in *Garcia*. The Court will evaluate then, if necessary, whether to
19 extend the stay.

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21 || IT IS SO ORDERED.

22 | DATED: March 29, 2013

Larry A. Bunner

HONORABLE LARRY ALAN BURNS
United States District Judge